5. It was submitted by learned counsel for the appellant that notwithstanding the death of Mrs. Elizabeth Thein the reference under section 20(3) of the Act must be adjudicated upon by the Industrial Court after the appellant has been substituted as a party in place of the deceased under section 29(a). Apparently, learned counsel was relying on a passage in the judgment of Chang Min Tat, F.J. in the Federal Court case of *Assunta Hospital* v. *Dr. A. Dutt*[1] at page 116 where the learned judge said:

> "..... Once the Minister decides to make the reference and his order is not set aside, the Industrial Court is seised with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction. Failure to do so may result in an order for mandamus ....."

6. For the respondent, it was argued by learned counsel that the provision of section 29(a) does not apply in that the Industrial Court has no power to order a legal representative or administrator of the estate of the deceased workman to be substituted. It was contended further than the power under sub-paragraph (a) should be given a restricted construction.

7. In our judgment, the Assunta Hospital case *(supra)* can be distinguished from the facts of the present case in that the workman Dr. Dutt was still living when the appeal was heard. Whereas here the workman Mrs. Elizabeth Thein was already dead. In our judgment, the observation of the learned judge should be confined within the context of that case.

8. "Party" with reference to a trade dispute, means a trade union or workmen acting for all or any number of its members in the trade dispute, or an employer acting for himself in the trade dispute, or a trade union of employers acting for all or any number of its members in the trade dispute (see section 2). Having further regard to the definitions of "trade dispute" and "workman" in section 2 thereof, we are of the view that the word "party" in section 29(a) of the Act does not include the legal representative or administrator of the estate of the deceased workman.

9. Support for this narrow interpretation may be found in the provision of section 27(1)(c) and (d) of the Act which read as follows:

> 27(1) A party to a trade dispute, or to a reference to the court under section 20(3), may at proceedings before the court –
>
> (a) .....
>
> (b) .....
>
> (c) where the party is a workman (in proceedings under section 20(3)), appear himself personally;
>
> (d) where the party is a trade union, or an employer, or a workman (in proceedings under section 20(3)), be represented with the permission of the President or the Chairman, by an advocate .....

If the legal representative or administrator of the estate of the deceased workman were allowed to appear at the Industrial Court in proceedings under section 20(3) of the Act, express provision would be provided for it in the Act. But none was so provided either in the Act or in the Industrial Court Rules 1967.

10. Having regard to the abovementioned facts, we agree with the learned judge that proceedings under section 20(3) of the Act are a claim personal to the non-union workman and that it abated on his death. In short, the maxim *actio personalis moritur cum persona* applies to the facts of this case. In the result, we dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Shook Lin & Bok.*

LEE LAU & SONS REALTY SDN. BHD. v. TAN YAH & ORS.

[F.C. (Salleh Abas C.J. (Malaya), Abdul Hamid & Seah F.JJ.) February 7 & March 30, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 70 of 1982]

Tort – Negligence – Breach of statutory duty – No sufficient evidence to show that person injured who died was an employee of the appellants – Finding that deceased was independent contractor and invitee – Duty of occupier to invitee – Unusual danger – Not pleaded or proved.

In this case the appellants operated a brick-making factory. They also owned a forklift machine which was under the management of one Tan Kam Sing. While repairs were being effected to the forklift, Tan Kam Sing (the deceased) was injured and he later died from his injuries. A claim was instituted for negligence or alternatively breach of statutory duty against the appellants. Ajaib Singh J. in the High Court found that there was insufficient evidence to say that the deceased was an employee of the appellants. He also held that the appellants were not in

breach of the Factories and Machinery Act, 1967 and the regulations made thereunder. The learned Judge therefore held that the respondents had not proved their case as pleaded and there was no cross-appeal against these findings.

The learned judge went out to hold that the deceased was an independent contractor and an invitee and he held that the appellants were liable for negligence. He stated that the deceased was an invitee on the premises belonging to the appellants and as such they owed a duty to the deceased that he would not be placed in a position of danger or to create a dangerous situation whereby injury would be caused to him. The learned Judge gave judgment in favour of the respondents and awarded general damages and special damages. The appellants appealed. It was submitted on appeal that the learned judge erred in law in holding that the duty of the appellants at common law as occupiers towards the deceased as an invitee was that he should not be placed in a position of danger or to create a dangerous situation whereby injury would be caused to him. It was argued that the learned judge had failed to apply the correct test viz. in law the duty of an occupier towards his invitee is merely to use reasonable care to prevent damage from unusual danger or risk which the occupier knows or ought to know.

Held: (1) the invitor's duty is confined to protection against unusual dangers, that is, those not usually found in carrying out the task which the invitee has in hand;

(2) in this case the learned judge did not deal with the issue of unusual danger in his judgment as this had not been pleaded by the respondents in his statement of claim;

(3) the onus of pleading and proving "unusual" danger which the appellants knew or ought to have known rests on the respondents and since they had failed to establish it, the appellants owed no duty of care to the deceased.

Cases referred to:

(1) *Pearson* v. *Lambeth B.C.* [1950] 2 K.B. 353, 366.
(2) *Jacobs.* v. *L.C.C.* [1950] A.C. 361.
(3) *Fairman* v. *Perpetual Investment Building Society* [1923] A.C. 74.
(4) *Indermaur* v. *Dames* (1866) L.R. I.C.P. 274.
(5) *Wheat* v. *E. Lacon Co. Ltd.* [1966] 1 All E.R. 582, 593.
(6) *Lau Tin Sye* v. *Yusuf bin Muhammad* [1973] 2 M.L.J. 186.
(7) *Glasgow Corporation* v. *Muir* [1943] A.C. 448, 460, 3463.
(8) *London Graving Dock Co. Ltd.* v. *Horton* [1951] A.C. 737.

FEDERAL COURT.

R. Lazar for the appellants.
B.G. Martin for the respondents.

Cur. Adv. Vult.

Seah F.J. (delivering the Judgment of the Court): This is an appeal from a judgment of the High Court at Kuala Lumpur.

The facts may be briefly stated and they are as follows:

(a) The appellants, Lee Lau & Sons Realty Sdn. Bhd. operated and may still be operating a brick-making factory at Desa Jaya, Kepong, Selangor. They also owned a forklift machine which was under the management of the late Tan Kam Sing (hereinafter referred to as the deceased) at the material time.

(b) Only July 15, 1978 at about 11.00 a.m. the deceased complained to Lee Swee Meng (DW1), a "Kepala" of the appellants, that the fan belt of the forklift had been broken. This was duly replaced by Chow Kwan Meng (DW2) a foreman of the appellants in charge of general repairs. At about 3.00 p.m. the same afternoon, the deceased lodged another complaint that the hydraulic pump of the forklift was leaking. At the request of the foreman, the deceased jacked up the forklift mechanically to a height between 5 to 6 feet and used 2 rubber tree stumps to support the heavy horizontal iron bar of the forklift. The foreman went under the raised forklift and saw that the oil ring of the hydraulic pump was leaking badly. While the foreman was away to get a spanner, the deceased went under to have a look at the hydraulic pump, the 2 rubber tree stumps gave way, the forklift collapsed and the heavy horizontal iron bar fell onto the deceased causing him serious injuries from which he later died without recovering consciousness.

(c) A claim for damages was instituted in the High Court by the (i) 1st and 2nd respondents who are the natural parents of the deceased; (ii) 3rd respondent, who is the lawful widow of the deceased and (iii) 4th respondent, who is the infant son of the deceased. All the four respondents claim to be dependants of the deceased.

(d) The learned judge Ajaib Singh J. gave judgment in favour of the respondents and awarded a total sum of $69,864.00 as general damages and $1,022.00 as special damages.

According to the statement of claim the case of the respondents was grounded on the fact that the deceased was an employee of the appellants and that the accident on July 15, 1978 was caused solely by the negligence of the appellants or their servant or agent. Alternatively, the respondents also averred that the appellants were in breach of

their statutory duty under the Factories and Machinery Act 1967 and the regulations made thereunder.

The appellants in their defence denied that the deceased was their employee and averred that the deceased was at all material times an independent contractor. They also denied that they or their servant or agent had been negligent or in breach of any statutory duty. They lastly averred that the accident was caused or contributed to by the negligence of the deceased himself.

After hearing the evidence adduced the learned judge ruled that there was insufficient evidence to say that the deceased was an employee of the appellants. He also held that the appellants were not in breach of any of the provisions in the Factories and Machinery Act 1967 and the regulations made thereunder. The effect of these rulings is that the respondents had not succeeded in proving their case as pleaded and there was no cross-appeal by the respondents against these findings of the Court below. In our opinion there was ample evidence to support these findings.

However, the learned judge found as a fact that the deceased was an independent contractor and might be regarded as an invitee. In *Pearson* v. *Lambeth B.C.*[1] Asquith LJ. said:

"... It is more exact to say that an invitee is a person who comes on the occupier's premises with his consent on business in which the occupier and he have a common interest."

This requirement of community of interest is to be found in many of the cases and was approved by the House of Lords in *Jacobs* v. *L.C.C.*[2] in which the question was whether a customer at a shop, occupied by a tenant of the defendants, who suffered personal injuries from the defective state of the forecourt, occupied by the defendants, was their licensee or their invitee. Lord Simonds, whose judgment was concurred by the other members of the House, held that the plaintiff was a licensee because three of the Law Lords in the rather similar case of *Fairman* v. *Perpetual Investment Building Society*[3] had expressed the view that such was the status of a person in those circumstances. There was no cross-appeal by the respondents against this finding of the learned judge, and in our judgment, there was ample evidence to support it.

Having found that the deceased was an invitee at the time of the accident, the learned judge proceeded to state the law governing the case as follows:

"But the deceased certainly was an invitee on the premises belonging to the defendants and as such they owed a duty to the deceased that he would not be placed in a position of danger or create a dangerous situation whereby injury would be caused to him. On the evidence before me I held that the defendants' servant, the foreman DW2 was negligent in the manner by which he handled the situation ..."

At the hearing of this appeal, learned counsel for the appellants had submitted that the learned judge erred in law in holding that the duty of the appellants at common law, as occupiers, towards the deceased, as an invitee, was that he should not be placed in a position of danger or create a dangerous situation whereby injury would be caused to him. It was argued that the learned judge had failed to apply the correct test, viz. in law the duty of an occupier towards his invitee is merely to use reasonable care to prevent damage from unusual danger or risk which the occupier knows or ought to know.

The leading case on liability to an invitee at common law was *Indermaur* v. *Dames*[4] where a workman employed by a gasfitter went to a sugar-refinery to test some gasburners and fell into an unfenced shaft. The occupiers of the factory were held liable for the accident and at page 288 Willes J. stated the principle of the invitor's liability in tort as follows:

"And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

This statement of the law has long been regarded as an authoritative exposition of the duty owed by an invitor to an invitee and had been consistently accepted and applied by the House of Lords in numerous cases until the Occupiers' Liability Act 1957 (which came into operation in England and Wales on January 1, 1958) which abolished the distinction between invitees and licencees and classed them all as "visitors". The Act, which does not apply in Malaysia, put on the occupier the same duty to all of them, viz. the common duty of care [per Lord Denning in *Wheat* v. *E. Lacon Co. Ltd.*[5]]. In Malaysia, the rule in *Indermaur* v. *Dames* was applied by the Federal Court in the

case of *Lau Tin Sye* v. *Yusuf bin Muhammad*[6]. Special rules apply to the position of those who come as invitees upon premises. And the cause of action based on invitation is different, because it depends primarily, not on what actually happened (except in the sense that what actually happened would be essential to complete the cause of action by showing damage) but on whether the invitor (it is convenient to use the word) knew or ought to have known that the invitee was being exposed to unusual danger [per Lord Wright in *Glasgow Corporation* v. *Muir*[7]].

Applying this to that part of the judgment of the learned judge where he purported to expound the law governing the relationship of an invitor and invitee, it is plain that the learned judge erred in stating the law wider than that laid down in *Indermaur* v. *Dames* and purported to place the duty on the appellants on a much wider basis than is there postulated. In other words, the learned judge would impose on the appellants a degree of care higher than the law exacts. In our opinion, a dangerous situation *per se* does not constitute "unusual" danger or risk.

The invitor's duty is confined to protection against "unusual" dangers and in *London Graving Dock Co. Ltd.* v. *Horton*[8] the House of Lords ruled that an "unusual" risk is one which is not usually found in carrying out the task which the invitee has in hand. In the Court below, the learned judge did not deal with the issue of "unusual" danger in his judgment as this had not been pleaded by the respondents in their statement of claim. However, on the facts found by the learned judge, we do not think the act of raising the forklift mechanically and using 2 rubber tree stumps to support the heavy horizontal iron bar, amounted to "unusual" risk. If this were so the respondents would have pleaded it in their reply. In our opinion, these facts might constitute "incidental or usual" danger which could reasonably be foreseen, by the deceased in the course of his employment.

In *Horton's case* Lord Normand said at page 751:

"The occupier has no duty to the invitee unless there is unusual danger which he knew or ought to have known ..."

And at page 758 Lord Oaksey in the same case observed:

"An occupier owes no duty to an invitee in respect of "usual" dangers since the invitee is only entitled to expect that the invitor will take care to prevent damage from "unusual" danger; ..."

The onus of pleading and proving "unusual" danger which the appellants knew or ought to have known, rests on the respondents and since they had failed to establish it, the appellants owed no duty of care to the deceased. Much as we sympathise with the dependants of the deceased, we have no alternative but to set aside the judgment of the Court below. The appeal is therefore allowed with costs here and below. The $500.00 deposit to be refunded to the appellants.

Appeal allowed.

Solicitors: *B.G. Martin & Co.; Shearn, Delamore & Co.*

MERSING OMNIBUS CO. SDN. BHD. v. MINISTER OF LABOUR AND MANPOWER & ANOR.

[F.C. (Raja Azlan Shah L.P., Abdul Hamid & Abdoolcader F.JJ.) March 31, 1983.]

[Kuala Lumpur – Federal Court Civil Appeal No. 203 of 1982]

Administrative Law – Decision of Minister of Labour and Manpower that company extend recognition to a Union – Application for certiorari – Application made after six weeks of the date of decision – No application for extension of time – Court has no jurisdiction to grant leave to apply for certiorari – R.H.C. 1980, 0.3 r. 2(2), 0.53 rr. 1 & 1A. – Industrial Relations Act, 1967, s. 9(5) – Courts of Judicature Act, 1964, Schedule para 1.

Practice and procedure – Application for certiorari – Application made out of time – No application for extension of time – Court has no jurisdiction to grant leave – R.H.C. 1980, O. 3 r.2(2) & O. 53 rr. 1 & 1A.

In this case the Minister of Labour had given his decision that the appellant extend recognition to the second respondent for the categories of employees stipulated therein. The decision was given on the November 23, 1981. On January 9, 1982 the appellant sought leave to apply for *certiorari* to quash the decision of the Minister. Leave was granted but subsequently on the substantive application for *certiorari*, the application was dismissed. The appellant appealed. Order 53, rule 1A of the Rules of the High Court, 1980, provides that leave shall not be granted to apply for an order of *certiorari* unless the application for leave is made within six weeks after the date of the proceeding or the delay is accounted for to the satisfaction of the court or judge to whom the application was made.